



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: MARCH 03, 2023

IN THE MATTER OF:

Appeal Board No. 626752

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective November 19, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by THE CITY OF NEW YORK prior to November 19, 2021, cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held telephone conference hearings at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed November 09, 2022 (), the Administrative Law Judge overruled the initial determination.

The employer appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statements submitted by the claimant and on behalf of the employer.

Our review of the record reveals that the case should be remanded to hold a further hearing. The record was not sufficiently developed on the determination of misconduct. The parties should have another opportunity to submit additional testimony and other evidence on this issue.

Initially, we note that the Judge's holding "other allegations of misconduct contained in the OATH decision that (are) beyond the determination in this case [cannot] be considered in determining whether the claimant is disqualified from receiving benefits" is inconsistent with the Court's holding in *Matter of Winters*, 109 AD3d 1034 (3d Dept 2013). To this end, the parties

are hereby placed on notice that the Judge shall consider whether the claimant's failure to cooperate with the employer's investigation, which was a part of the OATH proceedings and decision, constituted disqualifying misconduct.

Evidence shall be taken regarding the employer's investigation as to the charges leveled against the claimant, including the employer's policies pertaining to the claimant's need to cooperate in any investigation, how and when the employer notified the claimant of the investigation, the claimant's response, if any, and what transpired thereafter. Any documentary evidence relevant to such inquiry, including but not limited to the employer's policies as to employee participation in investigations and the employer's inquiry letter, dated October 22, 2020, requesting that the claimant participate in a telephone interview, shall be produced at hearing for entrance into the record after an opportunity for objection.

The Judge will then take all additional testimony and evidence necessary to complete the record.

Now, based on the foregoing, it is

ORDERED, that the decision of the Administrative Law Judge be, and the same hereby is, rescinded; and it is further

ORDERED, that the case shall be, and the same hereby is, remanded to the Hearing Section to hold a hearing on the issue ONLY, upon due notice to all parties and their representatives; and it is further

ORDERED, that the hearing shall be conducted so that there has been an opportunity for the above action to be taken, and so that at the end of the hearing, all parties will have had a full and fair opportunity to be heard; and it is further

ORDERED, that an Administrative Law Judge shall render a new decision, on the issue, which shall be based on the entire record in this case, including the testimony and other evidence from the original and the remand hearings, and which shall contain appropriate findings of fact and conclusions of law.

RANDALL T. DOUGLAS, MEMBER
SC:ER